TRANSBAY VENTURES SDN BHD

v.

PUBLIC BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[ORIGINATING SUMMONS NO: D8-24-355-2005]
15 NOVEMBER 2006

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Inter partes judgment - Whether invalid- Rules of natural justice - Whether obtained in breach of - Whether judgment certain on calculation of interest - Whether there was defect in order - Whether should be set aside ex debito justitiae - Whether defendant's application to strike out plaintiff's originating summons allowed*

In this originating summons, the plaintiff ('Transbay') sought a declaration that an *inter partes* judgment granted in civil suit D3-22-2239-2001 ('the D3 suit') and affirmed on appeal on 12 May 2004 was invalid. The bank brought the D3 suit against Transbay to recover a sum of money owing under certain banking facilities granted to the latter. The bank filed an application for summary judgment in the D3 suit and Transbay resisted the application. On 22 August 2003, the senior assistant registrar granted the bank's summary judgment application. Transbay filed a notice of appeal to the judge in chambers and upon hearing the parties, the judge dismissed the appeal. Transbay did not pay the amount due under the said order and the bank on 7 January 2005 filed a winding up petition against Transbay. While the companies winding up proceedings were still pending, Transbay filed this originating summons to declare the judgment in the D3 suit invalid. The bank filed an application under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980 to strike out the originating summons. The plaintiff's claim was buttressed on two contentions that the judgment should be set aside *'ex debito justitiae'* (a) that the judgment was uncertain and unclear because it encompassed an element of contractual interest at a fluctuating rate; and (b) that the judgment did not sufficiently specify when interest began to run and when such interest ran depended upon the absolute discretion of the defendant. The bank in its submissions said that the matter had been fully and finally adjudicated by the court in the D3 suit and as such setting aside the order would not be

permissible. It was further argued that the order could not be set aside unless it had been obtained in breach of the rules of natural justice.

Held (allowing defendant's application to strike out the plaintiff's originating summons with costs):

(1) Transbay had proceeded with an appeal to the judge and lost. By virtue of this fact, the judgment was not shown to have been obtained in breach of the rules of natural justice. The judgment was not given *ex parte*. The judgment here was made *inter partes*, from the hearing of the summary judgment application before the senior registrar right up to the appeal before the judge in chambers. The application was fully argued at both levels. Clearly it could not be said that there was a breach of natural justice. (para 12)

(2) The judgment was certain on the calculation of interest. The margin had been specified at 2.5%. As for base lending rate which may fluctuate, this was easily ascertained and this court took judicial notice that banks were required to post it at their premises and also notify public in the press. Hence the issue of uncertainty fell as there was no defect in the order. There was no difficulty in ascertaining the continuing interest *vide* the order in D3 suit. The plaintiff would not be perplexed as to the amount of interest it would have to pay. (para 16)

(3) Transbay had repeatedly made admissions of the debt owing under the judgment. It merely sought time to pay. It would not be inappropriate to say that Transbay was now estopped from questioning the orders. (para 17)

Case(s) referred to:

Badiaddin Mohd Mahidin v. Arab Malaysia Finance [1998] 2 CLJ 75 FC ***(refd)***

Eu Finance Bhd v. Lim Yoke Foo [1982] 2 MLJ 37 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d)

For the plaintiff - Liza Chan (Ms Rubini with her); M/s Liza Chan & Co
For the defendant - Benjamin Dawson; M/s Benjamin Dawson

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Said J:

[1] In this originating summons, the plaintiff ("Transbay") sought a declaration that an *inter partes* judgment granted in Civil Suit D3-22-2239-2001 ("the D3 suit") and affirmed on appeal on 12 May 2004 is invalid.

[2] The bank brought the D3 suit against Transbay to recover a sum of money owing under certain banking facilities granted to the latter. Transbay was represented by counsel throughout the proceeding.

[3] The bank filed an application for summary judgment in the D3 suit and Transbay, who was represented by counsel throughout the proceedings, resisted the application. On 22 August 2003, the senior assistant registrar granted the bank's summary judgment application. On 22 August 2003, Transbay filed a notice of appeal to the judge in chambers. Upon hearing the parties, the learned judge dismissed the appeal. Transbay did not appeal against the judge's order.

[4] Transbay did not pay the amount due under the said order. The bank on 7 January 2005 filed a winding-up petition against the Transbay *vide* D7-28-13-05. While the Companies Winding-up proceedings were still pending, Transbay filed this originating summons to declare the judgment in the D3 suit invalid. The bank filed an application under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980 to strike out the originating summons. I heard this striking out application and granted the bank's application and ordered that the originality summons be struck off with cost.

[5] Plaintiff claim is buttressed on two contentions that the judgment should be set aside *"ex-debito justitiae"* ie;

a) that the judgment is uncertain and unclear because it encompasses an element of contractual interest at a fluctuating rate; and

b) that the judgment did not sufficiently specify when interest begins to run and when such interest runs depended upon the absolute discretion of the defendant.

[6] The bank in its submissions said that the matter has been fully and finally adjudicated by the court in the D3 suit and as such setting aside the order would not be permissible, unless it defies a substantive statutory prohibition. The order could not also be set aside unless it has been obtained in breach of the rules of natural justice, see *Badiaddin bin Mohd Mahidin v. Arab Malaysia Finance* [1998] 2 CLJ 75. The bank further submitted that Transbay had not suggested that the orders were given in defiance of any statutory prohibition, nor did it complain about any breach of the rules of natural justice. In fact Transbay had appealed to the judge in chambers against the decision of the senior assistant registrar and lost.

[7] Transbay harped on the case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 in its submissions that the judgment is seriously flawed and riddled with uncertainty, by reason of a fluctuating base lending rate. Transbay next turned to *Badiaddin bin Mohd Mahidin v. Arab-Malaysia Finance Bhd* [1998] 1 MLJ 393 to support its argument that the a judgment containing a serious defect may be set aside *ex debito justitiae*. It also referred to *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 which suggests that an *inter partes* judgment may be set aside when it is null and void.

[8] Transbay denied that its delay in filing is fatal to this action. Transbay relied on *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] where the court set aside the judgment for uncertainty even though there was a delay of three years in filing the application to set aside. Transbay denied that it admitted the plaintiff's claim and insisted that it was neither an unequivocal, nor comprehensive admission. Instead Transbay said that it was erroneously made in ignorance of legal rights.

[9] It is trite that the judgment in the D3 suit is a final judgment on a matter that had been fully and finally adjudicated by the court. Transbay had never suggested that the judgment is in defiance of any substantive statutory prohibition, it was also not Transbay's case that there is any non-compliance with any procedural requirements on the part of the bank. Transbay's contention was that the judgment is flawed as it is uncertain, unclear and did not sufficiently specify when interest begins to run.

[10] Transbay is entitled to have the order set aside *ex debito justitiae* if the judgment or order had been obtained in breach of a rule of court or of practice. It is open to Transbay to mount a collateral attack on the orders without resorting to the appeal procedure if the order is a nullity to have it set aside *ex debit justitiae*. Mohd Azmi FCJ in *Badiaddin* had succinctly dealt with this categories of cases as follows:

> The privy council through Lord Diplock also emphasized that the Courts in England have not closed the door as to the type of defects in the final judgment of the Court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specially it includes orders that have been obtained in breach of the rules of natural justice'. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject.
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> The general rule is that where the order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the Court may declare an act that purports to bind to be non-existent. In *Hackness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 229, Lord Diplock LJ (now Law Lord) said (at page 739) that 'it has been long laid down that where an order is a nullity, the person whom the other purports to affect has the option either of ignoring it or of going to the Court and asking for it to be set aside.

[11] The Lordship next cautioned that this discretion must be exercised judicially in exceptional cases when the defect is of such a serious nature in the following words:

A For my part, I must hasten to add that apart from the breach of rules of natural justice, any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any statutory prohibition as
B to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to defect in a final order which has contravene a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that
C there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

D **[12]** From the facts of our case Transbay did proceed with an appeal to the judge and lost. By virtue of this fact, the judgment was not shown to have been obtained in breach of the rules of natural justice. The judgment was neither given *ex parte*, nor was it made in default of the defendant's appearance. The judgment here was made *inter partes* and the plaintiff was very much present
E by its advocate from the hearing of the summary judgment application before the senior registrar right up to the appeal before the judge in chambers. The application was fully argued at both levels and the plaintiff lost. The plaintiff through its advocate was accorded all the right to be heard. Clearly it cannot be said that
F there was breach of natural justice.

[13] The case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 has no application to the present case. This is because the judgment in default did not
G define the words "margin" and "prescribed rate". It also dealt with the procedural impropriety in the decision making process by the judge which by itself was sufficient for the court to set aside the order. The judgment was riddled with uncertainties serious enough to render it an irregular judgment. There the "prescribed
H rate" was uncertain as the prescribed rate is "the sum of the margin and the base lending rate." The judgment obtained against Transbay identifies the margin as 2.5% above the base lending rate which was 6.4% per annum.

I **[14]** For ease of reference, the judgment of 22 August 2003 is reproduced below:

ADALAH PADA HARI INI DIHAKIMKAN bahawa Defendan hendaklah membayar kepada Plaintif seperti berikut:

(a) jumlah terhutang sebanyak RM13,860,089.29 setakat 31.10.2001;

(b) faedah berterusan ke atas jumlah RM13,860,089.29 pada kadar 2.50% setahun ke atas Kadar Pinjaman Dasar Plaintif pada rehatan bulanan ("Kadar Priskrip") (Kadar Pinjaman Dasar Plaintif setakat 31.10.2001 adalah 6.40% setahun) dengan faedah tambahan pada kadar 1.0% setahun ke atas Kadar Priskrip dari 1.11.2001 sehingga tarikh penyelesaian penuh.

[15] As to the calculation of interest, the order stated clearly that its on the amount of RM13,860,089.29 as at 31 October 2001 and continuing at the rate of 2.5% per year above defendant's base lending rate on monthly rest (prescribed rate). The plaintiff's base lending rate @ 31 October 2001 is specified in the judgment at 6.40% per annum together with additional interest at the rate of 1.0% per annum over the prescribed rate from 1 November 2001 until date of full settlement.

[16] I am satisfied the judgment is certain on the calculation of interest. The margin had been specified at 2.5%. As for base lending rate which may fluctuate, this is easily ascertained and I take judicial notice that banks are required to post it at their premises and also notify public in the press. Hence the issue of uncertainty falls as there is no defect in the order. There is no difficulty in ascertaining the continuing interest *vide* the order in D3 suit. The plaintiff would not be perplexed as to the amount of interest he would have to pay.

[17] Lastly, I observe Transbay, who was represented by a different counsel in the winding-up proceeding in their sworn affidavit repeatedly made admissions of the debt owing under the judgment. It merely sought time to pay. It would not be inappropriate to say that Transbay is now estopped from questioning the orders.

[18] For all the above reasons, I allowed the defendant's application to strike out the plaintiff's originating summons with costs.